***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

76-1132

To be argued by

HENRY PUTZEL, III

B P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1132

---

UNITED STATES OF AMERICA,

Appellee,

against

LAWRENCE IAROSSI, JAMES PANEBIANCO, LEONARD RIZZO, RENATO CROCE, PATSY ANATALA, SNIDER BLANCHARD and CHARLES BROOKS,

Defandants-
Appellants.

---

On Appeal from the United States District Court for the Southern District of New York

---

# BRIEF ON BEHALF OF APPELLANT LAWRENCE IAROSSI

---



HENRY PUTZEL, III
Attorney for De-
fendant-Appellant
Lawrence Iarossi

140 West 62nd Street
New York, New York

(212) 956-7144

Dated: New York, New York
June 30, 1976

# I N D E X

TABLE OF CASES

## TABLE OF CASES

## Questions Presented

1. Whether the Court committed reversible error in denying the defendant's motion for a judgment of acquittal in light of undisputed evidence that the defendant Iarossi ceased all participation in the conspiracy and was, in fact, imprisoned on other charges months before the five-year period of limitations commenced to run.

2. Whether the Court committed reversible error in declining to charge the jury with respect to Iarossi's statute of limitations defense and in declining to permit counsel to raise the issue in summation.

3. Whether the evidence showed the existence of multiple conspiracies -- only one of which included the defendant Iarossi -- and thus created a fatal variance from the single conspiracy charged in the indictment.

4. Whether the defendant Iarossi was sentenced ex post facto in light of the fact that the statute under which he was sentenced as a second narcotics offender was enacted substantially after he was convicted and imprisoned for the first narcotics offense upon which the sentence was predicated.

## PRELIMINARY STATEMENT

Lawrence Iarossi appeals from a judgment of conviction entered against him in the United States District Court for the Southern District of New York following a ten-day jury trial before the Honorable Dudley B. Bonsal, United States District Judge.

Indictment 75 Cr. 722, in twney-three counts was filed August 4, 1975 and charged fourteen defendants with participation in a narcotics conspiracy and related substantive offenses in violation of Title 21, United States Code, Sections 173, 174, 846, 812, 841(a)(1) and 841(b)(1)(A).* Iarossi and co-defendants William Huff and John D'Amato were named only in Count One (conspiracy) and were not charged with commission of any substantive offenses. Counts Two through Twenty-three charged co-defendants Virgil Alessi, Anthony Passero, James Panebianco, Graziano Rizzo, Leonard Rizzo, Joseph Barone, Fiore Rizzo, Renato Croce, Patsy Anatala, Snider Blanchard and Charles Brooks with substantive narcotics offenses. Prior to trial, the defendants Graziano Rizzo, Barone and D'Amato entered pleas of guilty to selected counts of the indictment, and defendants Alessi, Huff and Fiore Rizzo were severed from trial of the others. Anthony Passero has been a fugitive throughout the proceedings.

Trial as to the remaining seven defendants commenced January 21, 1976 before Judge Bonsal and a jury and concluded on February 6, 1976 with a verdict convicting the defendants as charged.

---

* Indictment 75 Cr. 722 superseded Indictment 75 Cr. 170, which was filed on February 21, 1975.

On March 24, 1976 Judge Bonsal sentenced Iarossi as a second narcotics offender to a mandatory minimum ten-year term of imprisonment and a six-year special parole term, to be served concurrently with the fifteen year term of imprisonment which he is presently serving following a 1969 narcotics conviction in the United States District Court for the Southern District of New York upon Indictment 69 Cr. 439.**

** Iarossi commenced service of the fifteen-year sentence on April 22, 1970 (T. 1286). All references to "T." are to pages from the transcript of the trial. All references to "A." are to the appellant's joint appendix.

## STATEMENT OF THE EVIDENCE AS TO

## LAWRENCE IAROSSI

### Introduction

The single count of the indictment naming Iarossi charged him with participating in a conspiracy to distribute heroin which commenced in early 1968 and continued through 1973. The Government's proof at trial showed at best that Iarossi completely ceased participating in the alleged conspiracy in the spring of 1970, before the commission of any of the twenty-two substantive crimes charged to co-defendants in the indictment.

It is the principal burden of this brief to focus clearly on the evidence adduced at trial as to Lawrence Iarossi and thereby to demonstrate that, even by the Government's evidence, he was improperly convicted because his conspiratorial activities occurred before the five-year period of limitations commenced to run. To that end, the statement of facts set forth below will center upon Iarossi's participation in the conspiracy as shown by the Government's evidence. A brief summary of the evidence as to conspiratorial activities taking place after Iarossi's withdrawal in the spring of 1970 is included in order to supply the Court with a necessary context by which to measure the extent and duration of his participation.

The Court is respectfully referred to the statements of facts on behalf of co-defendants for a more detailed rendition of their participation in the conspiracy.

### The Government's Case

The Government's case against Iarossi was established exclusively through the testimony of co-conspirators Mary Mobley and Anthony Manfredonia, who described heroin transactions with Iarossi starting in 1967 and continu-

ing intermittently until early 1970.

Manfredonia testified that, in association with a number of different suppliers and purchasers, he engaged in narcotics trafficking from 1966 until April, 1972. In 19 , Manfredonia and a partner, Vito Panzarino, commenced obtaining heroin from one Sal Lania and selling primarily to the defendant Snider Blanchard in Baltimore, Maryland (T. 382-3). Following his association with Panzarino, Manfredonia and Angelo Memone obtained heroin from Freddy Papa and, as before, sold to Blanchard (T. 384-5).

In 1967 Manfredonia commenced a partnership with the defendant Lawrence Iarossi, first by purchasing heroin from Iarossi for resale to Blanchard (T.388), later by purchasing heroin with Iarossi from Vincent Papa and Jack Lolorrieri, who were operating in the Astoria Colts Club on Ditmars Avenue, Queens. (T.389-95). Their primary customer continued to be Blanchard, who received deliveries by way of a courier, Anthony Simonetti. (T.402-6). With the proceeds of such sales, Manfredonia and Iarossi would pay Papa the purchase price and split the balance. (T. 407).

In late 1968, Iarossi commenced selling heroin to co-conspirator Alvin Clark, owner of the Dog and Burger restaurant in Pittsburgh. Clark would fly to New York, accompanied by Mobley, and would obtain heroin from Iarossi, most frequently at Laguardia Airport. Mobley would transport the contraband back to Pittsburgh, where she would give it to Clark (T. 34-7, 51-3). Upon occasion, Iarossi and Manfredonia would bring heroin to Clark in Pittsburgh or deliver it to him personally in New York (T. 416-421). Mobley testified that she first met Manfredonia--known to her as "Ralphie"-shortly before Christmas, 1968,

during an airport rendezvous with Iarossi. Thereafter, on subsequent trips, she received additional packages of contraband, first from both Iarossi and Manfredonia, later from Manfredonia alone. (T. 421, 424).

In January, 1970, Mobley met Iarossi for the last time in the Allegheny General Hospital in Pittsburgh, where Clark was convalescing. Thereafter, she testified, she transacted no further business with Iarossi and, in fact, never knew what became of him after that meeting. (T. 63).

Manfredonia's final narcotics transaction with Iarossi took place in "about February or March" 1970, when he and Iarossi delivered one-half kilogram of heroin to Blanchard's laundromat in Baltimore. (T. 428-9). Thereafter, Manfredonia did no further business with Iarossi, and both went "out of the business." (T. 627-8) When Manfredonia resumed narcotics trafficking in October or November, 1970, he did so with a new partner, Joseph Barone. (T. 430, 628).

In the fall of 1970, Manfredonia was introduced to Barone, who stated that he had a customer, G. T. Watson, who needed heroin. Manfredonia obtained the contraband from Vincent Papa, Virgil Alessi and Anthony Passero, whom he located at the Scotts Pub in Queens, and he turned it over to his new partner Barone. Similar narcotics transactions among the same parties took place three or four times in 1970 (T. 430-434). There was no testimony whatsoever that Iarossi was associated in any way with such sales. In 1971, Manfredonia and Barone continued to receive heroin from Papa, Alessi and Passero and to sell it to G. T. Watson, Alvin Clark and Blanchard.* (T. 434-444).

---

* Manfredonia used a number of messengers for such transactions, including John D'Amato, Thomas Murray, and Frank D'Amato. (T. 448-450).

Manfredonia described other narcotics transactions in which he engaged with sundry other sellers and purchasers during 1971: Charles Brooks (T. 451-454), James Panebianco (T. 454-5), Graziano Rizzo (T. 434-5, 454, 460), Louis Inglese (T. 454, 469-70), Patsy Anatala (T. 434-5, 454, 460), Louis Inglese (T. 454, 469-70), Patsy Anatala (T. 462-466), Charles Huff (T. 463-465), and Leonard Rizzo (T. 466-468). And he continued to transact business with Clark, Mobley and Blanchard (T. 456-7, 460-61, 470). There was no evidence linking Iarossi to any of the transactions, nor was he charged with commission of any of the substantive offenses charged in the indictment which related to such transactions.

The remainder of the Government's evidence consisted in corroborating the testimony of Manfredonia concerning his post-1970 transactions. Iarossi, having established through Manfredonia that he was "out of the business" in the spring of 1970, rested without calling any witnesses.

## ARGUMENT

### POINT ONE

IAROSSI ESTABLISHED THAT HE HAD CEASED PARTICIPATING IN THE CONSPIRACY WELL BEFORE THE COMMENCEMENT OF THE PERIOD OF LIMITATIONS ON AUGUST 4, 1970; THE COURT THEREFORE ERRED IN DENYING HIS MOTION FOR A JUDGMENT OF ACQUITTAL AND FURTHER ERRED IN DECLINING TO SUBMIT THE STATUTE OF LIMITATIONS DEFENSE TO THE JURY.

It is well-established that, in any conspiracy prosecution, the Government must establish beyond a reasonable doubt that "the particular agreement into which a defendant entered continued into the period not barred by limitation . . . and the scope of his agreement must be determined individually from what was proved as to him." United States v. Borelli, 336 F.2d 376, 385 (2d Cir. 1964), cert. denied sub nom Cinquegrano v. United States, 376 U.S. 960 (1965), citing Grunewald v. United States, 353 U.S. 391, 397 (1957) (emphasis supplied). United States v. Reina, 242 F.2d 302, 305-6, (2d Cir. 1957), cert denied, 354 U.S. 913, rehearing denied 355 U.S. 852 (1957). In order to raise the defense that a prosecution is time-barred by the statute of limitations, the defendant must adduce affirmative evidence that he was no longer a member of the conspiracy during the five-year period preceding the filing of the indictment. United States v. Borelli, supra, at 385-6.* In the instant case, the Government's chief witness, Anthony Manfredonia, testified that, after February or March, 1970, Iarossi ceased dealing in narcotics. (T. 628). The Government offered no evidence whatsoever of conspiratorial activity by Iarossi after this point and, indeed, conceded out of the jury's

---

* Because the instant indictment was filed August 4, 1975, the period of limitations extended to August 4, 1970. Title 18, United States Code, Section 3282.

presence that Iarossi had been incarcerated since April 22, 1970 and that there was no evidence of his participation in the conspiracy after that date (T. 1286).* Nevertheless, the Court denied the defendant's Rule 29 motion for a judgment of acquittal on the basis of the statute of limitations and, further, refused to charge the jury on the statute of limitations defense or even to permit counsel to argue the issue to the jury. Such rulings constituted reversible error. United States v. Grunewald, supra; United States v. Borelli, supra; United States v. Alfonso-Perez, 2d Cir. Dkt. No. 75-1395 (decided May 17, 1976), slip op. at 3761.

A. The Court should have granted the defendant's Rule 29 motion because of the Government's failure to adduce any proof that Iarossi was a member of the conspiracy during the period of limitations.

The entire thrust of Grunewald, supra, and Borelli, supra, is that "nobody is liable in conspiracy except for the fair import of the concerted purpose as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it." United States v. Borelli, supra at 385 (emphasis added), citing United States v. Peoni, 100 F.2d 401, 403 (2d Cir., 1938). And the statute of limitations begins to run when the agreement of the individual conspirator terminates, as evidenced by some affirmative demonstration of withdrawal. Id., at 389.

---

* In colloquy with the Court at the close of the Government's case, the prosecutor, after first conceding that Iarossi had been incarcerated since April 22, 1970, said: "These people [the defendants], from the top on down, were engaged in selling heroin from 1968 to 1972, and the only person who might have a claim that he stopped his [sic] Iarossi, and he stopped because he withdrew, not because he firmly denounced what was going on, [but] because he went in the can. He withdrew as anybody else would withdraw and his responsibility was not lessened by the fact that he stopped dealing." (T. 1304).

The Government's proof at trial established at best that Iarossi and the co-conspirator Manfredonia engaged in a series of narcotics transactions with the co-conspirators Mobley and Clark from some time in 1967 through January of 1970. In February or March of 1970, Iarossi and Manfredonia delivered heroin to the co-conspirator Snider Blanchard at his Baltimore laundromat and thereupon ceased dealing in narcotics. Manfredonia testified, in fact, that after such trip both he and Iarossi were out of the narcotics business. When Manfredonia resumed selling heroin, in October or November, 1970, he did so with a new partner, Joseph Barone. (T. 430, 628). By adducing such testimony from Manfredonia, Iarossi satisfied his burden of establishing withdrawal prior to the commencement of the five-year period of limitations on August 4, 1970. Indeed, during argument of Iarossi's Rule 29 motion for a judgment of acquittal, Government counsel conceded that there was no evidence of further participation by Iarossi following his incarceration on April 22, 1970. (T. 1286). On this record, therefore, there was no evidence whatsoever that Iarossi was a participant in the conspiracy during the period of limitations, and he was therefore entitled to a judgment of acquittal.

In response to such argument, the Government asserted at trial that the applicable date fixing the period of limitations should have been February 21, 1975 -- the filing date of an earlier superseded indictment, 75 Cr. 170 -- rather than the August date on which the indictment at bar was filed. Such argument should be rejected. At no time prior to trial did the Government move pursuant to Rule 13, F. R. Cr. Proc., to consolidate the indictments for trial. Never, until the close of its case, did the Government

claim that, although the expanded August indictment was to serve as the formal charge in the case, the February indictment fixed the period of limitations. Such an argument, if adopted, would serve, in effect, to extend the period of limitations retroactively beyond the five-year period unambiguously mandated by statute:

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found... within five years next after such offense shall have been committed." Title 18, United States Code, Section 3282 (emphasis added).

Moreover, such construction flies in the face of the directive of the Supreme Court that "criminal limitations statutes are 'to be liberally interpreted in favor of repose'", Toussie v. United States, 397 U.S. 112 115 (1970), citing United States v. Scharton, 285 U.S. 518, 522 (1932). In short, the statutory language is clear and affords no latitude for the construction urged at trial by the Government.

In an analagous case, the Second Circuit assumed, without deciding, that the Government must adhere to the period of limitations as fixed by the indictment at trial. United States v. Klein, 247 F.2d 908 (2d Cir., 1957), cert. denied 355 U.S. 924 (1958). In Klein, the defendants were indicted for conspiracy to defraud the Internal Revenue Service. On September 17, 1954, the Government filed a superseding indictment incorporating essentially the same conspiracy count and proceeded to trial upon the latter indictment. The Court said, "Since the indictment upon which the appellants were prosecuted

was filed September 17, 1954, the three-year statute of limitations here applicable, 18 U.S.C. § 3232, requires proof of a conspiracy continuing after September 17, 1951." Id. at 912, 919.*

A sound basis in policy also supports the construction urged above. In addition to one obvious objective of the statute of limitations, to prohibit criminal prosecutions on overstale facts, see, United States v. Marion, 404 U.S. 307, 323 (1971), Toussie v. United States, supra, and United States v. Lwell, supra, the statutory requirement that the period of limitations be calculated from the filing of the indictment affords the defendant clear notice of the period of time which he must consider in preparing his defense. The Government's reading of the statute denied such notice to Iarossi. Having been tried upon the superseding indictment, Iarossi was given no notice whatsoever that the Government would claim the February indictment to fix the period of limitations. With any such notice, defense counsel's cross-examination of Manfredonia would have probed his hazy memory concerning the final narcotics transaction in "about February or March" (T. 428) in which he and Iarossi allegedly participated. (Point I(B), infra).

---

* In United States v. Ewell, 383 U.S. 116, 122 (1966), the Supreme Court also appears to have assumed, without deciding, the same issue. There, the Court reviewed the validity of a superseding indictment filed after the dismissal of a first indictment. Both indictments were addressed to the same facts, but the second indictment added counts based on additional statutes. In upholding the second indictment, the Court explicitly noted that the superseding indictment had been filed within the period of limitations and was not defective on that basis. Such dictum would be superfluous under the Government's theory in this case that the first indictment tolls the statute of limitations for all time. Cf., United States v. Macklin, 2d Cir. Dkt. No. 75-1419, decided May 3, 1976, slip op. at 3525, 3527.

Compare with United States v. Strewl, 99 F.2nd 474 (2d Cir. 1938), 162 F.2d 819 (2d Cir. 1947).*

The Government's assertion that the statute of limitations was tolled as to the August indictment with the filing of the February indictment is identical to the position taken by the Government--and flatly rejected by the Court--in a recent case arising in the United States District Court for the Eastern District of New York. United States v. Moskowitz, 356 F. Supp. 331 (E.D.N.Y. 1973). There, in a tax evasion case, the Government first indicted the defendant on April 13, 1972, two days before the applicable statute of limitations was to run. On May 9, 1972, a superseding indictment was filed in the same case. Rejecting a Government claim identical to that at bar, Judge Neaher dismissed the superseding indictment. United States v. Moskowitz, supra. In doing so, moreover, the Court also held that Title 18, United States Code, Section 3288--establishing a grace period of six months following the dismissal of an indictment after expiration of the period of limitations--was wholly inapplicable. See, United States v. Strewl, 162 F.2d 819 (2d Cir. 1947).

---

* The Strewl case, cited above, appears to be the only Second Circuit authority for the theory advanced at trial by the Government. There, the Court reviewed a claim that the statute of limitations barred prosecution upon a superseding indictment filed after the three-year statute of limitations had run upon the alleged crimes. In upholding the conviction, the Court, held under a predecessor statute to Rule 52(a), F.R.Cr.Proc., that the error "did not effect Strewl's 'substantial rights' in the slightest degree", 99 F.2d at 477, and therefore that the error was harmless. In the instant case, the error was far from harmless, for some time during the six-month hiatus between the two indictments, the Government's own witness testified that Iarossi went "out of the business" (T. 628). Hence, it was essential for counsel to know which of the two indictments fixed the period of limitations. Operating on the justifiable assumption that the August indictment at bar fixed a period of limitations starting August 4, 1970, counsel did not press Manfredonia on his dim recollection that Iarossi's last participation in the conspiracy came in February or March of 1970. Had the earlier date been established as the crucial start of the period of limitations, counsel would of course, have probed further. Hence, on its facts, Strewl differs markedly from the instant case. Compare with United States v. Klein, supra.

Congressional Information Service
[illegible] Publishing
Washington, D.C. 20014
Telephone 301/654 [illegible]

EDITOR'S NOTE

Pages 13 were missing at time of filming. If, and when obtained, a corrected fiche will be forwarded to you.

Ordinarily, the defendant who properly raises a statute of limitations defense is only entitled to have such defense submitted to the jury upon appropriate instructions. United States v. Borelli, supra, at 389. In the instant case, however, there was literally no issue of fact which remained for the jury's consideration, for the Government had conceded that Iarossi had ceased participating in the conspiracy following--at the latest--his incarceration in April, 1970. The prosecution made no claim whatsoever that narcotics obtained by Iarossi were sold after he went to prison, compare with United States v. Borelli, supra at 389, or that he continued to transact business from his prison cell, compare with United States v. Agueci, 310 F.2d 838-9 (2d Cir. 1962) and cases cited therein, nor was it even asserted that there was evidence that Iarossi continued to have a stake in the venture after February or March, 1970.* To the contrary, Government counsel conceded that Iarossi did not continue to participate in the conspiracy after his incarceration. (T. 1286, 1304).** Thus, submission of the issue to the jury was

---

* The best evidence that the Government did not consider Iarossi to be responsible in any way for the narcotics transactions taking place after the spring of 1970 is that he was not indicted on a Pinkerton theory for any substantive offenses.

**The Government contended at trial (T. 1304) that, in order to establish withdrawal from the conspiracy, Iarossi was required to "denounce" his co-conspirators or otherwise comply with the stringent requirements set forth in Hyde v. United States, 225 U.S. 347, 369 (1912). The Borelli court, however, flatly rejected the argument that "mere proof of past dealings with the core suffice[s] to permit a jury to infer an agreement to participate in its continuing activities to the end of time." 336 F.2d at 388. Instead, it held that "each defendant can be held only for that part of the conspiracy which he understood and assented to, and since the statute will begin to run for him when his own agreement terminates, it is neither unfair nor unreasonable to require affirmative demonstration that he was abrogating it at an earlier date." Id. at 388-9. Because Manfredonia himself supplied such evidence that Iarossi was "out of the business" before the period of limitations, the jury should not have been permitted to draw the inference that Iarossi continued to be accountable for the acts of co-conspirators during the five years preceding August 4, 1975.

unnecessary, for the Government utterly failed to establish even an inference that Iarossi was a member of the conspiracy during the five-year period preceding the filing of the indictment. Accordingly, the Court erred in denying Iarossi's Rule 29 motion for a judgment of acquittal.

B. The Court erroneously declined to charge the jury with respect to the statute of limitations defense or to permit counsel to argue the issue to the jury.

It is well-established that the statute of limitations defense, once raised, presents at the very least an issue of fact which should properly be submitted to the jury. Failure to do so constitutes reversible error. United States v. Borelli, supra, United States v. Alfonso-Perez, supra. In spite of the fact that Iarossi's trial counsel properly raised the issue by adducing affirmative evidence of withdrawal, Judge Bonsal, the same district judge who presided over the Borelli trial, declined to instruct the jury on the statute limitations defense or even to allow the jury to hear argument on the issue. (T. 1489-92). Such rulings were "fatal error". United States v. Alfonso-Perez, supra, at 3766.

Following denial of his Rule 29 motion based upon the statute of limitations, Iarossi's trial counsel submitted several proposed jury charges with respect to the issue:

"3. Unless the jury finds that defendant Iarossi entered into the conspiracy charged, if such conspiracy is found by the jury, and remained in it beyond August 4, 1970 [the indictment was returned August 4, 1975] it must acquit Iarossi.

4. The testimony of Manfredonia that, as far as he, Manfredonia, was concerned that Iarossi was out of the business [narcotics deals] as of March, 1970, should be considered by the Jury as affirmative evidence of knowledge by the conspirators that Iarossi had abandoned the conspiracy.

* * *

6. The defendant is responsible only for his part in the conspiracy, if one is found, and the statute of limitations runs when his agreement terminates.

* * *

7. The statute of limitations for the crime of conspiracy is five years."

The Court denied all of the proposed requests and further directed counsel not to argue the issue to the jury. (T. 1489-92). Such rulings were apparently predicated upon the Court's erroneous acceptance of the February 21, 1975 date of the superseded indictment as the pivotal date by which to measure the period of limitations. For the reasons set forth in Part 1(A), infra, such ruling was error; the Court should have measured the limitations period from the date of the indictment at trial.

Even assuming arguendo that the Court correctly applied the date of the first indictment, an important issue of fact remained as to whether Iarossi was a member of the conspiracy during the five-year period not barred by the statute. Manfredonia's memory of his final transaction with Iarossi

was, to be charitable, a hazy recollection that the trip to Baltimore took place in "about February or March" of 1970 (T. 428), and the Government offered no corroboration of the date. On such flimsy evidence, the jury might well have concluded, if properly instructed, that the Government had failed to present evidence "beyond a reasonable doubt that the particular agreement into which the defendant entered continued into the period not barred by limitation." United States v. Borelli, supra, at 385, citing Grunewald v. United States, supra. As in United States v. Alfonso-Perez, supra, such requests properly alerted the Court to its fundamental obligation to charge the issue to the jury.*

Only recently in United States v. Alfonso-Perez, supra, did this Court reaffirm the Borelli requirement that "a statute of limitations charge must be given", United States v. Alfonso-Perez, supra, at 3765 (emphasis supplied). The instant case presents a far more compelling set of facts than those then before the Court. Iarossi was imprisoned and, by the Government's own concession, completely inactive during all of the five-year period for which he could be charged. The Court's refusal to frame this important issue for the jury's consideration deprived Iarossi of an essential defense. The resulting conviction should therefore, at the very least, be reversed and the case remanded for a new trial in which he may properly raise the statute of limitations defense.

---

* The Court's only reference to Iarossi's alleged participation in the conspiracy misstated the record concerning the time of Iarossi's involvement: "With respect to the defendant Mr. Iarossi, the government contends, on the basis of Manfredonia's testimony, that Iarossi was Manfredonia's partner in the heroin business from 1967 through 1969... and that [Iarossi] introduced Manfredonia to Clark in 1969. Then on the basis of Mary Mobley's testimony the Government contends that Iarossi supplied heroin to Clark in Pittsburgh by making deliveries to Mary Mobley at various New York airports... from around 1968 through 1971" (T. 1732). The Court declined counsel's proper request for a curative instruction and his renewed request for an instruction concerning Iarossi's withdrawal from the conspiracy. (T. 1798-1800).

POINT TWO

THE GOVERNEMENT'S EVIDENCE ESTABLISHED AT BEST THE EXISTENCE OF SEVERAL DISCREET CONSPIRACIES, ONLY ONE OF WHICH INVOLVED THE DEFENDANT IAROSSI: THE CONVICTION SHOULD THEREFORE BE REVERSED AND THE INDICTMENT DISMISSED.

The Government's evidence established at best the existence of a number of different narcotics conspiracies during the years 1966 through 1972. Only one such group included the defendant Lawrence Iarossi. For the same familiar reasons repeatedly articulated by this Court in United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974), United States v. Miley, 513 F.2d 1191 (2d Cir. 1975) and most recently in United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975), the convictions should be reversed and the indictment dismissed.*

A fair reading of the indictment and a comparison of its charges with the Government's proof at trial shows convincingly that the Government proceeded upon the theory that Manfredonia's numerous narcotics transactions constituted one conspiracy and that all of his suppliers and customers were properly chargeable in one omnibus count. The argument is absurd. Manfredonia himself testified that he went out of the heroin business for at least half a year (e.g., from "about February or March," 1970--T. 428--until September,

---

* Because the multiple conspiracy issue has been before this Court so frequently, this brief does not undertake to re-articulate the familiar arguments so cogently set forth in the opinions cited but, instead, incorporates them by reference. Suffice it to say that the indictment under consideration, filed between the oral argument of Bertolotti, supra, and this Court's decision in the case, was brought well after this Court's warnings on the subject of multiple conspiracies in the Sperling and Miley cases.

October or November, 1970 -- T. 430, 431). When he resumed, he took a new partner previously unknown to him -Barone- and sold to a number of new customers, e.g., G. T. Watson, Brooks, Anatala and Huff. The mere fact that he continued to obtain heroin from time-to-time from Papa and to sell it to Clark and Blanchard (among others) hardly justifies the conclusion that one continuing conspiracy existed. Iarossi was severely prejudiced by his inclusion in a trial in which the vast bulk of the evidence concerned alleged criminal enterprises with which he had nothing to do and which he had never agreed to undertake. In short, a fair reading of the record establishes convincingly that Iarossi was improperly joined and tried in one conspiracy indictment; that he suffered substantial and irremediable prejudice therefrom; and that the conviction should therefore be reversed and the indictment dismissed.

POINT THREE

IAROSSI WAS UNCONSTITUTIONALLY SENTENCED AS A SECOND NARCOTICS OFFENDER EX POST FACTO UNDER A STATUTE WHICH WAS ENACTED WELL AFTER HIS PREVIOUS 1969 NARCOTICS CONVICTION.

Iarossi was sentenced as a second narcotics offender to a mandatory minimum term of ten years' imprisonment and a special parole term of six years pursuant to the provisions of Title 21, United States Code, Sections 846, 848 and 851, the sentence to run concurrently with the fifteen-year term imposed upon him upon conviction in the Southern District of New York upon Indictment 69 Cr. 439. It is submitted that imposition of such sentence under Sections 848 and 851 flatly violates the prohibition against ex post facto laws set forth in Article I, Section 9[3] of the Constitution. Failing all of the other relief requested in Points One and Two, infra, it is respectfully submitted that the case must be remanded for re-sentencing.

The statute under which Iarossi was sentenced was enacted October 27, 1970, Pub. L. 91-513, Title II, § 408, 84 Stat. 1265, well after his 1969 conviction for which he was imprisoned in April, 1970. Hence, he is now being mandatorily sentenced to imprisonment for a conviction occurring well before the statute authorizing such second offender treatment. Such argument was duly made to Judge Bonsal, who rejected it without elaboration (T. 1873-4). It is difficult to conceive of a clearer instance in which a defendant is being made to answer to a statute enacted after the alleged criminal conduct which it punishes. No case has been found which refutes this contention. The leading Second Circuit case, United States v. Sierra,

297 F.2d 531 (2d Cir. 1961), cert. denied, 369 U.S. 853 (1962), rejected an ex post facto argument addressed to a predecessor statute because the Act in question was passed one year before the original narcotics conviction. In the instant case, of course, the first conviction preceded the statute. The case must, at the very least be remanded for resentencing.

POINT FOUR

THE DEFENDANT IAROSSI ADOPTS THE ARGUMENTS AND ISSUES RAISED BY CO-DEFENDANTS IN THIS CASE INSOFAR AS THE SAME ARE APPLICABLE TO HIM.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of conviction as to Lawrence Iarossi should be reversed and a judgment of acquittal entered in light of the government's total failure to establish that Iarossi was a member of the conspiracy during the five-year period preceding the filing of the indictment. In the alternative, the conviction should be reversed and the indictment dismissed or a new trial ordered. Finally, in the event that the above-relief is denied, the case should be remanded to the district court for resentencing.

Dated: New York, New York
June 30, 1976

Respectfully submitted,

Henry Putzel, III
Attorney for the Defendant
Lawrence Iarossi

AFFIDAVIT OF SERVICE

STATE OF NEW YORK )
CITY OF NEW YORK ) ss.

HENRY PUTZEL, III, being duly sworn, deposes and says that he is the attorney for the defendant LAWRENCE IAROSSI and that on the 30th day of June, 1976, he deposited two (2) copies of the appellant IAROSSI's brief and the joint appendix, firmly secured in a plain brown wrapper and addressed to:

HON. ROBERT B. FISKE, JR., UNITED STATES ATTORNEY
One Saint Andrew's Plaza
Foley Square
New York, N.Y. 10007

in a duly designated post office box located at 62nd Street and Columbus Avenue, New York City.

Henry Putzel

HENRY PUTZEL, III

Sworn to before me
this 30th day of June, 1976

Ann M. E. Maloney

ANN M. E. MALONEY
Notary Public, State of New York
No. 31-7684793 - New York County
Commission Expires March 30, 1978

A 202 Affidavit of Personal Service of Papers
COURTOF APPEALS
FOR THE SECOND CIRCUIT

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES OF AMERICA,
appellee

- against -

BROOKS,
appellant

*Index No.*

*Affidavit of Personal Service*

*STATE OF NEW YORK, COUNTY OF* NEW YORK *ss.:*

*I,* Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York
*That on the* 2nd *day of* August *19*76 *at* One St. Andrews Plaza, New York, New York
*deponent served the annexed* Brief *upon*
Robert B. Fiske Jr.
*the* *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

*Sworn to before me, this* 2nd
*day of* August *19* 76

Victor Ortega
VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1977